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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 72-479

Donald L. Garren and James A. Eddinger,

Petitioners

v.

City of Winston-Salem, North Carolina,

Respondent.

****

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

****

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

****

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STATEMENT OF CASE

The Board of Aldermen of the City of Winston-Salem decided that the City needed to establish additional sanitary landfills in order to dispose of its solid waste. The plan was to purchase three tracts, in addition to the one already owned in the northeast quadrant of the City, in order to serve the four quadrants of the City. The City purchased the tract that is the subject of this lawsuit to serve the southwest quadrant of the City. This tract was located within one mile of the City limits of the City of Winston-Salem and, thus was subject to the extraterritorial zoning powers granted to municipalities of over 1250 population by North Carolina General Statutes, § 160-181.2 and granted specifically to the City of Winston-Salem by Chapter 777 of the 1953 Session Laws of the General Assembly of North Carolina. Acting under this authority, the Board of Aldermen had on September 16, 1968, zoned the property R-5 and R-6, restrictive classifications for areas of single-family dwellings. Pursuant to this same authority, on September 16, 1969, the Board of Aldermen rezoned the property from R-5 and R-6 to I-3,

an industrial classification which, unlike classifications R-5 and R-6, would permit the construction of the sanitary landfill.

The plaintiffs live approximately 1200 and 4200 feet, respectively, from the landfill site. They brought this action to enjoin the use of the property for a sanitary landfill.

The District Court, after a hearing on the merits, dismissed the complaint for failure to state a claim cognizable under 42 U.S.C. § 1983 and the plaintiffs' appealed. The Court of Appeals affirmed the District Court on the basis that the plaintiffs' claim was one for the infringement of property rights and therefore not a violation of § 1983, citing Hague v. C.I.O, 307 U. S. 496. Garren v. City of Winston-Salem, 439 F. 2d 140 (1971). The plaintiffs petitioned for certiorari to this Court and the Court vacated the decision of the Court of Appeals in the light of Lynch v. Household Finance Corp., 405 U. S. ____ (1972). On remand the Court of Appeals again affirmed the District Court on the basis that the plaintiffs were not denied equal protection and that even if their constitutional rights had been violated,

they would not be entitled to the relief they sought.

I.

THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE APPELLANTS HAVE BEEN DENIED NO RIGHTS OF EQUAL PROTECTION.

While, it is submitted, it was unnecessary for the Court of Appeals to reach the constitutional issue in this case, it decided that issue correctly. The plaintiffs are not residents of the City of Winston-Salem. While conceding this, they contend that because the City of Winston-Salem has the power to zone real property within one mile of its borders, the plaintiffs should be given the right to vote in municipal elections. The Court of Appeals simply concluded that the plaintiffs' conclusion did not follow from its premise. It was the decision of that Court that to treat nonresidents of the City differently from residents with respect to voting rights is not discrimination, invidious or otherwise, but is, in fact, a reasonable classification. The property that is the source of this litigation and that was rezoned by the City of Winston-Salem is not the plaintiffs' property, but is property belonging to the City itself. As the Court of Appeals stated:

"The case comes down to a situation where the City is zoning and rezoning extraterritorial property which it owns in accordance with its constitutionally conferred statutory powers." ____ F. 2d at _____.

The fact that, as nonresidents, the plaintiffs were not given the right to vote for the body that exercised this statutorily conferred right gives rise to no constitutional violation.

The voting rights cases cited by the petitioners have no bearing on this case. This is not a case in which the plaintiffs are seeking the right to vote in municipal elections; rather, they are seeking to enjoin the construction of a landfill on City-owned property on the ground that the property was rezoned by a malapportioned body. The petitioners do not assert even the most tenuous connection between the constitutional rights they assert have been violated and the relief they seek. Such decisions as Cipriano v. Houma, 395 U.S. 701 (1968) and Phoenix v. Kolodziejski, 399 U.S. 204 (1970), are not even remotely in point. In those cases, the relief sought was the right to vote; in this

case, the relief sought is an injunction against the construction of a landfill. The distinction is fundamental.

The Court of Appeals cast doubt on the continuing validity of this Court's decision in Hunter v. City of Pittsburgh, 207 U. S. 161 (1907), and correctly held that even if that decision is no longer valid, the plaintiffs would be entitled to no relief here. It should be noted, however, that several lower courts have held that Hunter has not lost its vitality by reason of the reapportionment cases. See Dean Hill Country Club, Inc. v. City of Knoxville, 379 F. 2d 321 (6th Cir., 1967); Detroit Edison Co. v. East China Township District No. 3, 247 F. Supp. 296 (E.D. Mich.,1965), affirmed, 378 F. 2d 226 (6th Cir., 1967), cert. denied, 389 U. S. 962 (1967).

This Court may feel that the Hunter case is no longer applicable and that the lower court cases holding that the reapportionment cases do not affect its validity are incorrectly decided. It is submitted, however, that not only should such a reexamination of Hunter be by direct appeal

under the provisions of 28 U.S.C. § 1253 from the decision of a three-judge court, but that the reexamination should be accomplished in a case where relief appropriate to the issues raised is requested. Here, as the subsequent sections of this brief will point out, there is no connection between the relief the petitioners are seeking and the constitutional violations they assert.

II.

CERTIORARI WOULD BE INAPPROPRIATE BECAUSE THE OBJECT OF THIS ACTION IS NOT TO REDRESS THE DEPRIVATION OF CONSTITUTIONAL RIGHTS AND A FAVORABLE DECISION ON THE CONSTITUTIONAL QUESTION WOULD NOT ENTITLE THE PLAINTIFFS TO THE RELIEF PRAYED FOR.

It is submitted that the fundamental difficulty with the petitioners lawsuit is that they have never established a connection between the relief they seek, the elimination of the landfill, with the business of the Federal Courts. In the District Court, the Court of Appeals, in this Court in the first petition for certiorari and now in this Court again, the plaintiffs have yet to hint at a reason why their being "disenfranchised" in the manner alleged entitles them to enjoin the construction of the sanitary landfill. Consequently, this case would be inappropriate for the granting of certiorari, no matter how the members of this Court might feel about the ostensible question raised in the Petition, that of whether the petitioners as residents of the one-mile area surrounding the City of Winston-Salem subject to its

zoning powers, should have the right to vote for members of the Board of Aldermen.

As the Court of Appeals pointed out, if the petitioners are correct in their contention that the local act permitting the City of Winston-Salem to zone property outside of its borders is unconstitutional in that it does not provide for a means by which the petitioners and members of their class may vote for the body exercising that power, a decision upholding their contention would either have prospective or retroactive effect and either all zoning ordinances passed pursuant to it by improperly constituted boards would be invalid or only future ordinances enacted pursuant thereto would be so. In neither case would the petitioners be entitled to any relief here. On the other hand, if the petitioners are not attacking the constitutionality of the enabling act, they are in effect saying that an act validly performed pursuant to a valid delegation of power by the General Assembly is invalid, a non sequitur. If the general statute permitting extraterritorial zoning by municipalities is constitutional, it is a legal impossibility for a zoning ordinance enacted pursuant to it to be

unconstitutional so long as the ordinance is within the delegated power.

The petitioners' answer to this difficulty is that "it is traditional in the laws of zoning that preexisting land uses are accepted and validated, whether or not they were the result of prior zoning laws. And this Court has established that prior laws enacted by a malapportioned legislature are not invalid. Fortson v. Morris, 385 U.S. 231 (1966)." (Petition for Writ of Certiorari p. 22). The fact that preexisting uses are permitted under zoning ordinances is, of course, irrelevant. It is not the preexisting use that is the issue here, but the future use of the property. Surely, the petitioners cannot mean that under the law of zoning adjoining property owners may enjoin a neighboring property owner to continue a preexisting use. The petitioners' argument that prior laws enacted by a malapportioned legislature are valid is equally ineffective in overcoming this fundamental difficulty. In fact, the case of Fortson v. Morris is supportive of the respondent's position that no act of a malapportioned legislative body may be enjoined. It held that a malapportioned legislature could not be enjoined from selecting a governor.

The theory of the petitioners' case seems to be that they, as voters, can enjoin a single isolated act of a legislative body on the ground that the petitioners were not entitled to vote for the members of that body. The petitioners cite no cases here or in the Courts below to support their theory. The only attempt at distinction between the zoning ordinance attacked here and every other extraterritorial zoning enactment of the Board of Aldermen of the City of Winston-Salem that can be gleaned from the petitioners' brief and arguments is that they are basing their right to an injunction on this one and not on the others. Apparently, their contention is that a litigant may select those enactments of a malapportioned legislative body that he disapproves of and have them struck down, being at the same time careful not to disturb the legislation that he considers beneficial to his interest. The petitioners would go even further. They would not only enjoin the legislative act itself, but what they perceive to be the consequences of that act, the construction of the landfill. There is no basis in law for such an injunction. In Fortson v. Morris, supra, this Court held that a legislature could not be enjoined from selecting a governor because the legislature was

malapportioned. In Fortson, the issue was simply the election of the governor. Had the injunction been sought not against the election of the governor but against a specific act done by the governor and even further some purported result of that act, the facts would be even more analogous to those in this case.

In support of their theory, the petitioners allege in their complaint and have asserted throughout that they have consistently voiced their opposition to the proposed landfill site and feel that the action brought is timely. Conceivably, there are those who have consistently voiced their support for establishing the landfill where it was located and who live within one mile of the corporate limits of the City of Winston-Salem. Had the Board of Aldermen declined to rezone the property, presumably these people could have attacked the R-5 and R-6 classifications on the same grounds asserted here. By the petitioners' logic, they would have been entitled to an injunction invalidating the R-5 and R-6 classifications. If the petitioners' theory were sound, any person residing within one mile of the corporate limits could ignore any particular zoning ordinance of which he

disapproved and, at the same time, claim the benefit and protection of any such ordinance of which he approved. Neither logic nor law supports such a proposition.

The petitioners would have their case analogized to the reapportionment cases. Again, the dichotomy asserts itself. In the reapportionment cases, as their popular name implies, the attack was directed solely at the constituency of the elected body, not the validity of the acts done by the body, nor the consequences of those acts. The effect of the findings of the courts in those cases was that the governing body in question had to be reapportioned, not that its acts were invalid. As was stated by Mr. Justice Douglas in his separate opinion in Baker v. Carr, 369 U. S. 186 (1962):

> "The recent ruling by the Iowa Supreme Court that a legislature, though elected under an unfair apportionment scheme, is nonetheless a legislature, empowered to act (Cedar Rapids v. Cox, 252 Iowa 948, 964, 108 N.W. 2d 253, 262, 263; c.f. Kidd v. McCanless, 200 Tenn. 273, 292 S.W. 2d 40) is plainly correct."

Id. at 250 n. 5; see also People v. Turner, 32 Ill. 2d 212, 205 N.E. 2d 33 (1965); People v. O'Neil, 33 Ill. 2d 164, 210 N.E. 2d 526 (1965); Johnson v. Genessee County, 252 F. Supp. 567 (E.D. Mich. 1964).

In Reynolds v. Sims, 377 U. S. 533 (1964), this Court assumed that the invalidly apportioned Alabama legislature retained the power of legislative action and in Maryland Committee for Fair Representation v. Tawes, 377 U. S. 656 (1964), this Court recognized the "inherent power" of the Maryland legislature even though it was elected in violation of constitutional requirements. See also Matthews v. Hadley, 361 U. S. 127 (1959), where this Court affirmed without opinion the trial court's refusal to strike down Indiana's gross income tax on the ground that the legislature was malapportioned.

The petitioners place some reliance on Cipriano v. City of Houma, 395 U.S. 701 (1969), and Phoenix v. Kolodziejski, 399 U. S. 204 (1970). In both of these cases, the plaintiffs sued to enjoin the issuance of municipal bonds which had been authorized at an election in which the plaintiffs had not been allowed to vote. In both cases, the plaintiffs sought to prevent the direct consequence of the

tainted election, the issuance of bonds. These cases offer no support for the proposition that acts done pursuant to the enactments of a de facto legislative body are invalid.

The petitioners were not allowed to vote for the Board of Aldermen that enacted the original zoning classification, R-5 and R-6. If the ordinance rezoning the property to classification I-3 is invalid, then so must have been the original zoning enactment. It is clear that the petitioners have no standing as voters to attack either enactment, but if they attack one, the other must necessarily fall. Any other conclusion is absurd. Whether the petitioners' defect is stated in terms of a lack of standing to sue because there is no nexus between the status asserted by the litigant and the claim he presents (Flast v. Cohen, 392 U. S. 83, 102 [1968]) or whether it is stated in jurisdictional terms as a failure to assert a claim that arises under the Constitution or laws of the United States, the effect is the same.

42 U.S.C. § 1983 obviously contemplates that the action brought pursuant to it be designed to redress the deprivation of rights and not for some other

purpose, wholly unrelated to the deprivation. In Pierre v. Jordan, 333 F. 2d 951 (9th Cir. 1964) the plaintiff brought an action based in part upon 42 U.S.C. § 1983 to prevent the formation and financing of a waterworks district. She brought the action on behalf of herself and other property owners in the affected area. The Court held that the District Court did not have jurisdiction under § 1983 and 28 U.S.C. § 1343 because

> ". . . .[T]he prime purpose of the suit is not to redress those asserted constitutional deprivations per se but, on these and other grounds, to put the waterworks district out of business.
>
> * * * *
>
> "Where there is some other principal objective of the litigation, and the deprivation of constitutional rights is asserted only as a means of achieving that objective, the subject matter is not cognizable under the Civil Rights Act, and the district court jurisdiction thereunder is lacking."

333 F. 2d at 957, 958.

III.

THERE WERE ADEQUATE NON-FEDERAL GROUNDS FOR THE DECISIONS OF THE LOWER COURTS-- A MUNICIPALITY IS NOT SUBJECT TO ZONING REGULATIONS.

For the petitioners to be entitled to the relief they seek, it would be necessary for a court to find (1) that the local public acts (Session Laws 1947, Ch. 677, Section 23, et seq., as amended Session Laws 1953, Ch. 777, Section 1) and by implication G. S. § 160-181.2 are unconstitutional in allowing a municipality to exercise extraterritorial zoning powers without giving the franchise to those living in the areas over which the powers are exercised; (2) that because the statute is unconstitutional, the zoning regulation attacked here, and no other, is void and should be struck down, and (3) because the zoning regulation is void, uses to which the property has been put that would violate the prior zoning ordinance may be enjoined by a Federal Court. It is the third proposition to which this section of the brief is addressed.

At the outset, it should be noted that the petitioners have indicated no reason why they would be entitled to enjoin the proposed use upon establishing

the invalidity of the rezoning ordinance. Assuming the rezoning ordinance and no other enactment of the allegedly malapportioned board is invalid, there is still no basis for enjoining the proposed use. The cases are clear in North Carolina and elsewhere that a municipality may ignore its own zoning enactment or that of another governmental body in performing a governmental function. Thus, the Board of Aldermen did not need to rezone the property in the first place in order to construct the landfill. Under State law, the landfill could have been built regardless of how the property was zoned and the constitutionality of the zoning ordinance need not have been decided.

It is clear under North Carolina law that in constructing a sanitary landfill, a municipality is performing a governmental function. In Scales v. City of Winston-Salem, 189 N.C. 469, 127 S.E. 543 (1925), the plaintiffs sought to recover damages for personal injuries allegedly suffered from the City's operation of an incinerator for the burning of garbage. In holding that the plaintiff could not recover, the Supreme Court of North Carolina stated:

> "In applying these principles, we must hold that the incinerator was built in the discharge of a governmental function. The power to maintain public works, buildings and improvements; to remove garbage, and to provide for the health, comfort and welfare of the people is conferred by statutes on the cities and towns of the State . . . It was in pursuance of this legislation that the furnace was constructed; and . . . the acts complained of were in the performance of duties authorized by laws solely for the public benefit, governmental in character and not merely private and corporate."

Id. at 471, 127 S.E. at 545. See also James v. City of Charlotte, 183 N.C. 630, 112 S.E. 15 (1915).

It is equally clear in North Carolina that a municipality is not bound by its own zoning enactments. In McKinney v. City of High Point, 237 N.C. 66, 74 S.E. 2d 440 (1952), the plaintiffs complained that the erection by a municipality of a water storage tank in connection with its waterworks system was in violation of the zoning ordinances

of the City of High Point. After first finding that the construction of a water tank was the performance of the governmental function, the Court examined the cases in other jurisdictions on the point of whether or not a municipality is bound in the performance of a governmental function by zoning regulations and concluded as follows:

> "The Complaint does not state the purpose for which the defendant purchased land, and erected the water tank. It is a fair inference that it was erected for the purposes of public health, sanitation, fire protection and selling water for gain to the inhabitants and businesses within the City. Under our former decisions, we conclude, and so hold, that the erection of this water tank was done by the defendant in its governmental capacity and that its zoning ordinances did not apply."

Id. 75, 74 S.E. 2d at 446.

It was evident that the General Assembly of North Carolina intended that municipalities not be bound by zoning ordinances in the performance of governmental functions which do not involve

the construction or erection of buildings when it enacted N. C. General Statutes § 160-181.1 which makes zoning regulations applicable to the erection and construction of buildings by the State and its political subdivisions. The statute could have been made applicable to all governmental functions, rather than just the construction or erection of buildings; it was not.

The petitioners in the lower courts have advanced the theory that if the zoning regulation in question were struck down, the county could step in and enact zoning regulations that presumably would bind the City of Winston-Salem. The cases hold, however, that a municiplaity is no more bound by a zoning regulation of another governmental entity than it is by its own. City of Scottsdale v. Municipal Court of the City of Tempe, 368 P. 2d 637 (Ariz. 1962); State ex rel Askew v. Kopp, 330 S.W. 2d 882 (Mo. 1960).

Since under State law, the respondent could have ignored its own zoning ordinances and was not subject to the zoning jurisdiction of the county of Forsyth, an adjudication of the unconstitutionality of the legislation enabling the City to exercise extraterritorial zoning authority would not give

the petitioners the relief they seek.

Even more important, the petitioners have no standing under State law to enjoin the proposed use of the property on the grounds that the zoning ordinance is invalid. This is not only a collateral attack upon the ordinance itself, but the petitioners have not shown the requisite interest in the controversy to give them standing. Obviously, they have no standing as voters to prevent the construction of landfills. By the same token, under State law, they have no standing as "neighboring property owners" to enjoin the use to which the property is being put. Their only basis for standing is that they do not like having the landfill near them. This is insufficient. Ratner v. City of Richmond, 201 N.E. 2d 49 (Ind. 1964). The petitioners cite two North Carolina cases, Schloss v. Jamison, 258 N.C. 271, 128 S. E. 2d 590 (1962) and Clinard v. City of Winston-Salem, 217 N.C. 119, 6 S.E. 2d 867 (1940) for the proposition that the constitutionality of a zoning enactment may be tested by an action for an injunction. It need hardly be said that these cases involve actions to enjoin the enforcement of the ordinance insofar as it inhibited the use of the plaintiffs' own property. Obviously, these

cases have no bearing on the facts at hand.

IV.

CONCLUSION

The gist of the petitioners' claim is that they do not like having a sanitary landfill near their homes and that they would like to prevent the use of the respondent's property for that purpose. It is submitted that they cannot frame this claim in terms of the jurisdiction of the Federal Courts and that the petition for a writ of certiorari to the Court of Appeals for the Fourth Circuit should be denied.

Respectfully submitted this 20th day of October, 1972.

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